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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 453

CHARLES RHOTEN FINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Charles Rhoten Fine prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on October 13, 1953.

Opinion Below

The Memorandum Opinion of the Court of Appeals is not yet reported. A copy of same is annexed to the record.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

I. Does the search warrant particularly describe the place to be searched?

II. Is a search warrant valid when some one other than the affiant furnishes the description of the premises to be searched?

III. Does a search warrant, which purports to particularly describe a residence and authorizes a search only of such residence with no mention of authority to search other buildings, authorize the search of a building within the curtilage of such residence?

IV. Where a search under a warrant was made not only of the bedroom of the residence where the affiant to an affidavit in support of the search warrant reportedly saw illicit distilled spirits stored, but upon failure to find such spirits in said bedroom the search was extended to every room in the residence; and upon failure to find such spirits in any room of the residence the search was extended to an outhouse within the curtilage, where it was necessary for the officers to break the lock of such outhouse in order to enter, does such search constitute a general exploratory search as is prohibited by the Fourth Amendment to the Constitution of the United States?

Constitutional Provision and Rule of Criminal Procedure Involved

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(c), Federal Rules of Criminal Procedure, provides:

> "*Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * * "

Statement

Petitioner was indicted in the March Term, 1953, of the United States District Court for the Eastern Judicial District of Tennessee; said indictment being in two counts, the first of which charges possession of two and one-half gallons of distilled spirits in containers which did not have affixed stamps denoting the quantity of spirits therein and evidencing payment of taxes due thereon. The second count alleges the concealment of said spirits in a place other than a bonded warehouse (R. 3a). A sentence of 18 months imprisonment was imposed by the District Court on each count of the indictment, the sentences to run concurrently (R. 40a), which sentence was affirmed by the Court of Appeals (R. 41).

Prior to arraignment, petitioner moved to suppress the evidence obtained by a search conducted by federal officers under a warrant (R. 6a). The motion to suppress asserts that the evidence was obtained in violation of petitioner's constitutional rights in that the warrant incorrectly describes petitioner's residence; is insufficient on its face; was illegally executed; that a portion of petitioner's curtilage not described in the warrant was searched and the distilled spirits which formed the basis of the prosecution were found there; that the distilled spirits were found in a place

not described in the warrant; and that the search was a general exploratory search and not authorized under the warrant (R. 6a). The District Court overruled the motion to suppress and found the defendant guilty (R. 37a). A motion for new trial was filed based upon the District Court's failure to suppress the evidence and the action of the District Court in allowing the federal officers to testify concerning what they found in the search (R. 38a). The motion for new trial was overruled (R. 39a), and an appeal perfected to the United States Court of Appeals where the four questions presented here were there presented.

The affidavit on which the search warrant was issued sets forth the following (R. 4a):

> "On February 2, 1953 in the evening, I went to the home of Harve Fine in Newport, Tennessee to make arrangements with Fine to purchase twelve cases (72 gallons) of moonshine whiskey. While in the Fine home, I saw several cases of whiskey in one of the bedrooms. I took a drink from a jar of one of these cases and it was non tax paid whiskey. I later purchased 12 cases of whiskey from Fine."

A printed form was used in drawing up the search warrant. On this form appear the words within parenthesis "on the premises known as", and above these words in parenthesis appear the words "on the person of". The words "on the person of" were crossed out by typewriting. The word "premises" in the above warrant was printed on the form and above it the word "person" was printed, and on the warrant the word "person" was stricken out by typewriting. The word "place" as it appears in the above warrant was also printed on the form, and above it the word "person" was printed. The word "person" was stricken out by typewriting.

The search warrant issued is as follows (R. 5a):

"Affidavit having been made before me by Harry Blackburn that he (has reason to believe) that (on the premises known as) the Harve Fine residence and being a one story white frame dwelling with green single roof. Said house of about four rooms and located on the southeast corner of Mulberry Street and Cosby Cut-Off Road in Newport, Tenn. and facing in a northerly direction in the Eastern District of Tennessee, there is now being concealed certain property, namely distilled spirits in unstamped containers which are in violation of Section 2803a I. R. C. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (in the daytime) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 4th day of February, 1953.

(S.) H. M. BARNETT,
U. S. Commissioner."

The affiant to the affidavit in support of the search warrant did not know how to describe the premises of petitioner, so one of the federal officers made a special trip to Newport, Tennessee, where petitioner lived, to obtain a description and that federal officer provided the description which went in the affidavit in support of the warrant and the description which went in the warrant itself. The affidavit in support of the search warrant was prepared by this federal officer before the affiant was taken before the United States Commissioner who issued the warrant. The

federal officer who furnished the description for the affidavit in support of the warrant and the description that went in the warrant, was not himself an affiant before the Commissioner issuing the warrant.

Petitioner did not live at the corner of Mulberry Street and Cosby Cut-Off Road as stated in the search warrant, but lived a distance of more than 300 feet away at the corner of Mulberry Street and Prospect Street within the town of Newport, Tennessee.

In making the search, the officers did not use the description contained in the search warrant, but stated that they knew beforehand where they were to search.

In making the search, the officers first went in the bedroom where affiant stated in the affidavit made in support of the search warrant he had seen some jars of distilled spirits. The officers found no distilled spirits there. The officers then proceeded to search all four rooms of the residence and the rooms on the back porch of the residence, and found no distilled spirits there. Having failed to find any distilled spirits in the residence, the officers then went into the back yard where there was a shed not described in the warrant, which they found to be locked. The officers observed nothing that would lead them to believe there were distilled spirits in the shed, and the affidavit in support of the search warrant set forth no facts that would lead one to believe there were distilled spirits in the shed. The officers used a rim or wheel of an automobile to forcefully break the lock on the shed and then went in where they found the five half-gallon jars of distilled spirits for which petitioner was convicted. The District Court and the Court of Appeals held this small shed or storehouse to be within the curtilage of the residence.

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that the house searched was described in the warrant and situated on the premises described.

(2) In pretermitting the second question involved, which was:

> "Is a search warrant valid when some one other than the affiant furnishes the description of the premises to be searched?"

It was error for the Court of Appeals to fail to hold that such information as to description furnished by some one other than the affiant constitutes hearsay and invalidates the warrant, and that such evidence is in violation of Rule 41(c), Federal Rules of Criminal Procedure, which requires all evidence before the Commissioner who is issuing the search warrant to be in the form of an affidavit sworn to before the Commissioner.

(3) In holding that a warrant which particularly describes a residence and confines the authority to search to the residence proper also authorizes the search of any building within the curtilage of such residence.

(4) In pretermitting the fourth question raised, and in failing to hold that the search conducted by federal officers in this case was a general exploratory search such as is prohibited by the Fourth Amendment to the Constitution of the United States.

(5) In affirming the judgment of the District Court, thus permitting the admission of evidence seized under an illegal search.

Reasons for Granting the Writ

(1) In deciding that the description in the warrant was sufficient and in citing *Sparks* v. *United States*, 90 F. (2d) 61, 63 (C. C. A. 6), in support of such decision, the District

Court and the Court of Appeals in effect hold that a description which authorizes the search of "the Harve Fine residence" is sufficient because the officers could ascertain by inquiry where Harve Fine resided. Suppose one has two "residences" as was the situation in *Roberson* v. *United States* (C. C. A. 6, 1948), 165 F. (2d) 752. This Court has never held that the mere naming of a person in a search warrant meets the constitutional requirement of the Fourth Amended that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, *and particularly describing the place to be searched,* • • • " (emphasis supplied).

(2) The holdings of the District Court and the Court of Appeals nullify the provisions of the Fourth Amendment, providing that a description of the premises to be searched must be a part of the probable cause and supported by oath or affirmation, and the provisions of Rule 41(c), Federal Rules of Criminal Procedure, providing that a warrant shall issue only on affidavit sworn to before the judge or commissioner. The affiant who made the affidavit in this case was unable to supply a description of the premises to be searched and a federal officer, out of the presence of the affiant, made a trip to the home town of petitioner and obtained the description that was put in the affidavit and the warrant. The description of the premises was a part of the probable cause. The officer supplying the description was not an affiant before the Commissioner who issued the warrant. There was no compliance with the Fourth Amendment and with Rule 41(c), Federal Rules of Criminal Procedure, requiring oath or affirmation as to the description of the premises to be searched to be sworn to before the Commissioner. The United States Court of Appeals for the Sixth Circuit has previously held in *Sparks* v. *United States* (1937), 90 F. (2d) 61, that "warrants based on information and belief are usually invalid." The Court in

that case held the warrant valid, however, because there was also oral testimony presented before the magistrate. This decision was prior to the adoption of Rule 41(c), Federal Rules of Criminal Procedure, which requires all evidence in support of a warrant to be in affidavit form. Of the utmost importance, however, is the fact that the decision of the Court of Appeals in this case is in direct conflict with the previous decision of this Court in *Nathanson* v. *United States,* 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159, holding a warrant void which is issued on hearsay evidence.

(3) The decisions of the District Court and the Court of Appeals, holding that a search warrant which authorizes the search of a residence which is purportedly minutely described also authorizes the search of all buildings, even though not described, which are within the curtilage of such residence, are the first federal decisions so holding and present an important question of federal law which has not been settled but should be settled by this Court.

The decision is far-reaching and if carried to its logical conclusion authorizes the issuance of the iniquitous and obnoxious general warrants which the Fourth Amendment was designed to prevent, and which this Court has repeatedly condemned. *Boyd* v. *United States,* 116 U. S. 616, 623, S. Ct. 524, 29 L. Ed. 746; *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341; *Go-Bart Importing Company, et al.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 158, 75 L. Ed. 374. This decision, which so stretches the Fourth Amendment and thus affects the security of all persons against unreasonable searches and seizures, raises a question of gravity and general importance which it is plainly in the public interest to have decided by this Court of last resort. No question is more substantial or of greater and more wide spread importance than one such as this which infringes the security and civil liberties of persons within the United

States as guaranteed to them under the Bill of Rights. The sum and substance of the holdings of the District Court and the Court of Appeals in this case is that federal officers, without violating the provisions of the Fourth Amendment, under a warrant authorizing the search of "John Doe's residence" without further description, may search every room of his residence, and upon failure to find the article sought may extend the search to all buildings within the curtilage. The warrant here falsely described the location of petitioner's premises, and the affidavit in support of the warrant gave information that the articles to be searched for were in one bedroom of the residence. Every room of the residence was searched under the warrant, and on failure to find the articles sought the search was extended to two rooms on the back porch of the residence, which rooms were not described in the warrant, and on failure to find there the articles sought, the officers then went out into the yard and without reason to believe that the articles sought were in the shed within the curtilage they used force to knock a lock from the shed and searched the shed where the five half-gallon jars of distilled spirits, which formed the basis for this prosecution, were found. Such a search constitutes a general search and is condemned by the Constitution and is in direct conflict with applicable decisions of this Court. *Go-Bart Importing Company, et al.* v. *United States*, 282 U. S. 344, 51 S. Ct. 153, 158, 75 L. Ed. 374; *Harris* v. *United States*, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner,
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Knoxville, Tennessee.

This the — day of October, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 453

CHARLES RHOTEN FINE

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 42–43) is not yet reported. The oral opinion of the District Court overruling a motion to suppress appears at pages 33–35 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1953 (R. 43). The petition for a writ of certiorari was filed on November 2, 1953. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the search warrant sufficiently described the place to be searched.

2. Whether the affidavit in support of a warrant was rendered invalid by the fact that a person other than affiant visited the premises and obtained a detailed description of them, which was then incorporated into the affidavit and the warrant.

3. Whether officers acting under a warrant for the search of specified premises were justified in searching a shed in the rear of the house.

CONSTITUTION, STATUTE, AND RULE INVOLVED

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Internal Revenue Code:

> SEC. 2803 (a) [26 U. S. C. 2803 (a)]. [*Stamps for Containers of Distilled Spirits.*] *Requirement.*—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

SEC. 2913 [26 U. S. C. 2913]. *Penalty for unlawful concealment or removal of spirits.*—Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

Rule 41 (c), F. R. Crim. P., provides:

[Search and Seizure.] *Issuance and Contents.*—A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

STATEMENT

Petitioner was found guilty by the District Court for the Eastern District of Tennessee of

violating Sections 2803 (a) and 2913 of the Internal Revenue Code (*supra*, pp. 2–3) by possessing distilled spirits in containers which bore no tax stamps and by concealing the same following removal to a place other than a bonded warehouse (R. 37). He was given concurrent sentences of 18 months on each count (R. 40). On appeal, the judgment was affirmed, *per curiam* (R. 43).

The issues raised by the petition for certiorari relate to the validity of a search under a warrant which petitioner attacked by a motion to suppress (R. 6–7). By stipulation the motion to suppress and the merits were tried together before the court without a jury (R. 8). The pertinent facts with respect thereto may be summarized as follows:

Griffin, a special investigator for the Alcohol Tax Unit, received information from one Harry Blackman that he had seen and purchased nontaxpaid whiskey at the home of Harve Fine in Newport, Tennessee. (R. 4.) Griffin thereupon went to the Fine neighborhood and obtained a more detailed physical description of the premises. This description was incorporated into the affidavit executed by Blackman and the warrant issued on the basis thereof. It read as follows (R. 4):

> * * * that on the premises known as the Harve Fine residence being a one story white frame dwelling with green shingle

> roof. Said house of about four rooms and located on the southeast corner of Mulberry Street and Cosby Cut-off Road in Newport, Tenn. and facing in a northerly direction in the Eastern District of Tennessee * * *.

Petitioner, in his motion to suppress contended that the description was incorrect (R. 7). At the trial there was testimony of a Newport surveyor and other Newport people to the effect that the official name for the street intersecting Mulberry at the Fine residence was Prospect Avenue (R. 16, 17), and that there was a street called Cosby Cutoff some distance away (R. 16). There was also testimony by Griffin that, when he went out to examine the premises, persons in the neighborhood told him the cross street was Cosby Cutoff (R. 24). The officers who executed the warrant also testified that they knew the street in question as Cosby Cutoff (R. 13, 23, 28). The Court found that the preponderance of proof was that the correct name of the cross street was Prospect Avenue, but that nevertheless, the warrant sufficiently described the defendant's residence (R. 35).

In executing the search, the officers went to the Fine house and failed to find liquor in the house proper. However, in a small locked utility house or shed, about 20 feet from the rear of the house (R. 9, 14), they found the contraband liquor (R. 9, 12).

ARGUMENT

1. Petitioner contends (Pet. 7, 8) that the erroneous naming of the cross street rendered the description insufficient to meet the particularity required by the Fourth Amendment to the United States Constitution, *supra*, p. 2. The proper test, however, is expressed in *Steele* v. *United States*, 267 U. S. 498, as whether the officer to whom the warrant is addressed can with reasonable effort ascertain and identify the place intended to be searched. To a large extent this determination is one of fact. Clearly there is substantial evidence in the record for the trial court's finding, in accordance with the *Steele* standard, that the description satisfied constitutional requirements. The officers were able to find the house definitely and with certainty. There were three elements in the description, *viz.*, location by street, the physical description of the house, and its designation as the Harve Fine residence. There was no evidence that Fine's house could possibly have been mistaken for another by use of the description.

Erroneous parts of descriptions in warrants have frequently been held cured by other parts sufficiently clear to enable the officer to find the place definitely and with certainty. Especially is this true where the warrant contained a description of the premises as the residence of a named individual. *Kenney* v. *United States*, 157 F. 2d 442 (C. A. D. C.); *Martin* v. *United States*,

99 F. 2d 236 (C. A. 10); *Sparks* v. *United States*, 90 F. 2d 61 (C. A. 6).

2. The fact that part of the description in the affidavit was furnished by the officers rather than the affiant is immaterial, since the language of the Fourth Amendment "particularly describing the place to be searched" (*supra*, p. 2) states a requirement for the search warrant, not the affidavit. *Lowrey* v. *United States*, 161 F. 2d 30 (C. A. 8), certiorari denied, 331 U. S. 849, rehearing denied, 332 U. S. 787; *United States* v. *Wroblewski*, 105 F. 2d 444 (C. A. 7). Only sufficient description to support probable cause is needed in the affidavit under Rule 41 (c) of the F. R. Crim. P. (*supra*, p. 3), and "probable cause supported by oath or affirmation" under the Fourth Amendment does not require particularization in the description of the premises in the support for the warrant as does the language that the warrant itself must particularly describe the place to be searched. Hence, if the detailed description had not been in the affidavit at all it would have been sufficient. No contention is made that the affidavit fails to show probable cause in other respects.

3. Petitioner's claim (Pet. 9) that the shed could not be searched because not specifically named in the warrant is without foundation. The language in the warrant, "premises known as the Harve Fine residence" (R. 5) plainly

includes auxiliary buildings on the premises appurtenant thereto.

And even if the word "premises" were restricted to mean "dwelling house," the same result would follow, for the Court found and petitioner admits that the utility house was within the curtilage of the Fine dwelling. It is thus identified with the dwelling, and the protection afforded the house would extend to the shed, as being within the curtilage, so that a search of the shed, apart from the house, without a warrant would be unreasonable. *Roberson* v. *United States,* 165 F. 2d 752 (C. A. 6); *Wakkuri* v. *United States,* 67 F. 2d 844 (C. A. 6); *United States* v. *DiCorvo,* 37 F. 2d 124 (D. Conn.). The shed is likewise identified with the house under a warrant calling for a search of the dwelling house.

CONCLUSION

The court below correctly decided the issues of fact in this case under settled principles of law. It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY, III,
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BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

DECEMBER 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953